IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

WEDNESDAY, THE 5TH JULY 2006 / 14TH ASHADHA,1928

CRL.A.No. 1030 of 2001()

SC.145/1999 of ADDL. SESSIONS COURT-II, MAVELIKKARA

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APPELLANT:

SUKUMARAN, S/O.KESAVAN,
RENUKA NIVAS VEEDU, KANNIMEL MURI,
VALLIKUNNAM VILLAGE, MAVELIKKARA TALUK.

BY ADV. SRI.M.N.S.NAYAR

RESPONDENTS:

STATE OF KERALA REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.RAVIKUMAR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 05/07/2006, THE COURT ON 05/07/2006 DELIVERED THE FOLLOWING:

K.HEMA, J.

CRL.A.1030 OF 2001

Dated this the 5th day of July, 2006

JUDGMENT

Appellant challenges the conviction and sentence passed against him under Section 55(a) of the Abkari Act. He was sentenced to undergo imprisonment for two years and a fine of Rs.1,00,000/- under Section 55(a) of the Abkari Act in default of payment of fine imprisonment for one year.

2. According to prosecution, the accused was found carrying two bottles containing 750 ml of arrack on 6.6.1997 at about 6.30 p.m. He was found on a public road by the side of the road carrying a packet in front of a tea shop. On suspicion, he was apprehended and on examination, the packet was found to contain two bottles. On smell and taste, it was identified as arrack by the Excise officials. Exhibit P1 mahazar was prepared. Samples were taken from the bottles. Those were same. Accused was arrested and released on bail from the spot. Pws 1 and 5 are official witnesses. PW6 is the Assistant Excise Inspector who has conducted the investigation. PW7 completed the investigation and laid the charge. The article was sent for chemical analysis through the court and as

per the report, Exhibit P5, it contains ethyl alcohol.

3. On analysis of the evidence in detail, the court below found that the evidence of official witnesses cannot be discarded for the mere reason that they are officials. It was held that seizure was effected as alleged by the prosecution from the possession of the accused. The accused put forward a case that this is a falsely foisted case at the instance of PW5, an excise official, who has previous enmity towards the accused. Defence case was found to be not acceptable. According to the accused, PW5 demanded some money from the accused. He refused to pay the same and hence as a revenge, this case was foisted against him. Except suggestions, there are no materials to support this defence version.

4. Learned counsel appearing for the appellant submitted that the articles seized from the possession of the accused were not produced in court forthwith and hence there is violation of provisions in the Abkari Act and hence the accused is entitled for acquittal. On an analysis of the evidence in this case what I find is that there is no evidence to prove that the sample analysed in this case is the one recovered from the possession of the accused. The prosecution established that seizure was made from the possession of the accused. Two bottles containing arrack were seized from

him. A mahazar was prepared and samples were drawn from the said bottles. The above facts are established by the evidence of Pws 1 and 5. There is also no reason to reject their evidence.

5. However, the above evidence alone will not be sufficient to establish that the very same article seized from the possession of the accused (as stated by Pws 1 and 5) was analysed and found to be arrack. It is well settled that nature of the contraband article can be established only by scientific evidence. The oral evidence of the excise officials can be accepted if it is supported by scientific evidence. Though there is oral evidence for the fact that the article seized from the possession of the accused was arrack, there is no scientific evidence to show that the very same article was chemically analysed and proved to be 'liquor' as defined under the Abkari Act.

6. The evidence of Pws 1 and 5 would show that the seizure was effected and Mos 1 and 2 bottles were seized from the possession of the accused and samples were also drawn from those bottles. What happened to the samples are not disclosed from the evidence of either PW1 or PW5. No witness was examined to establish that the samples drawn from the contraband article found in possession of the accused, were produced before the court on the

same day or that the very same article was sent for analysis. An important link is missing in this case.

7. It is not sufficient for the prosecution to lead evidence to show that articles were seized and samples were drawn from the articles which were allegedly seized from the possession of the accused. The prosecution has also to establish that those samples were the articles which were sent for analysis and proved to be liquor. The evidence is lacking in this case to connect the sample analysed in this case with the articles which were allegedly seized from the possession of the accused. In the above circumstances, the conviction and sentenced passed against the accused for offence under Section 55(a) of the Abkari Act are unsustainable and those are liable to be set aside.

8. The court below has not considered this aspect. The court below has not enquired into whether the articles seized from the possession of the accused and which were analysed by the chemical analyst had any connection with each other. The court has not considered whether the articles seized from the possession of the accused were produced before the court as such, without tampering and whether those articles were analysed through the Chemical Examiner and it was certified to be arrack. It is not sufficient if

some samples are analysed and those are proved to be liquor. There is no satisfactory evidence to show that the sample analysed and reported to be liquor is the same article which was allegedly seized from the possession of the accused and hence the accused is entitled for acquittal.

In the result, the conviction and sentence passed against the accused under Section 55(a) of the Abkari Act are set aside. The accused is found not guilty of offence. He is set at liberty forthwith.

The appeal is allowed.

K.HEMA, JUDGE

vgs.

K.HEMA, J.

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JUDGMENT

5.7.2006